

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

75-1407

To be argued by
JONATHAN J. SILBERMANN

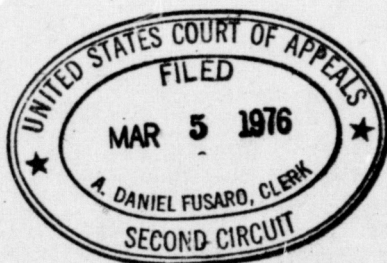
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
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Plaintiff-Appellee,
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-against-
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MICHAEL GOGARTY,
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:
Defendant-Appellant.
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PJS
Docket No. 5-1407

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
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I

While it was the Government which failed to inform either defense counsel or the District Court¹ about the deferred prosecution agreement and the dismissal of the assault charge covered by the agreement, the Government now seeks to argue

¹By notice of motion dated February 18, 1976, the Government moved in the District Court to amend the record in this case. The District Court's opinion dated March 4, 1976, granted the motion. A copy is A to appellant's supplemental appendix. This opinion indicates that the District Court was unaware of the dismissal of the assault charge. Appellant's Supplemental Appendix A at 2.

that appellant waived any argument based on the agreement and that appellant is improperly asserting that trial counsel was, in fact, ignorant of the prior proceedings (Government's Brief at 12-13).

Appellant properly bases his claim of non-waiver on the fact that the record is silent on this question. Boykin v. Alabama, 395 U.S. 238, 242-243 (1969); Carnley v. Cochran, 369 U.S. 506, 516 (1962). In addition, trial counsel's lack of knowledge of the information contained in the Magistrate's records is explained by the fact that the records of the Magistrate's court, where the agreement proceedings took place, were not forwarded to the District Court. This was in accord with the Magistrate's court practice of retaining the records of those cases in which the complaint was dismissed, as it was here. Thus, counsel would not have learned from the court records of the prior proceedings or of the involvement of another attorney.

Moreover, there is no possible strategic reason for trial counsel to waive the issue of the validity of appellant's prosecution on the previously dismissed assault charge since a successful challenge would have acted as a complete bar to appellant's conviction.

Further, the Government's claim of waiver can not be based on any act of appellant's. He is a chronic alcoholic (e.g., 19, 35, 38-39, 46, 60-62, 70; Report of Dr. Lawrence D. Sporty at 4, Record on Appeal, Document #) who had been under psy-

chiatric care for two and one-half years (58, 69, 71-72; Report of Dr. Sporty, supra). The significance of the prior proceedings to appellant, or indeed his ability to relate them to counsel or even to know that it was proper to tell them to counsel, prevents the assumption that appellant intelligently gave up a defense which was a bar to prosecution. Under analogous circumstances, this Court has indicated that waiver had not occurred. United States v. Tramunti, 500 F.2d 1334, 1340-1341 (2d Cir. 1974); see Appellant's Brief at 15-16;² see generally Johnson v. Zerbst, 304 U.S. 459, 469 (1938).

Despite the state of the record, the Government asserts

... that defense counsel had far more familiarity with Gogarty's past history than Gogarty would now have this Court believe.

(Government's Brief at 13),
and argues that appellant must fail because he does not submit to this Court an affidavit from counsel.

² Davis v. United States, 411 U.S. 233 (1973), and Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963), are distinguishable. In those cases the factual predicate for the claims made on appeal (challenges to the composition of grand and petit juries) was notorious. Moreover, the prejudice in this case -- appellant's conviction itself -- is clear.

While appellant contests the legitimacy of submitting an affidavit at this stage of the proceedings and the applicability of the cases cited by the Government,³ an affidavit from appellant's trial counsel containing the information to rebut the Government's assertions is available for this Court should it be desired.

II

The Government also argues in a footnote that the deferred prosecution agreement placed no time limit upon the Government obligating it to commence prosecution of appellant for violations of the terms of the agreement. This is not supported by the plain language of the agreement.

The terms and conditions of the deferred prosecution agreement required appellant, inter alia, to receive medical treatment and to "refrain from the violation of any State or Federal penal laws." (Appellant's Appendix G). The Government's position is that appellant's acts, particularly his conviction for violating Federal law on February 10, 1974,

³ The cases referred to by the Government relate to the filing of supporting affidavits in District Court proceedings. But see In re Francis Joseph Millaw, Doc. No. 75-1381, slip opinion 1525, 1539 (2d Cir., January 13, 1976).

indicate that appellant abrogated the agreement (Government's Brief at 15).⁴ Even assuming that this is correct, the operative language of the agreement applicable to appellant's prosecution still required the Government to commence prosecution within twelve months of the signing of the agreement:

Should you [appellant] violate any of the foregoing conditions or cease to be a satisfactory participant in the approved program, the United States Attorney may at any time, within the twelve month period of supervision, initiate prosecution for these offenses.

(Appellant's Appendix G).

The language of the agreement relating to a written report from appellant's clinic was only an administrative mechanism alerting the Government that the period of appellant's treatment had been completed and that dismissal was now appropriate. This language does allow the Government to dismiss the charges after the completion of the period of supervision, the situation here, but does not qualify the Government's obligation

⁴ The Government argues, presenting new information to this Court, that Gogarty did not comply with the agreement. This is used to support the position, nowhere made in the record below, that the Government's decision to seek dismissal of the charges, not once, but twice, was due to a reason other than the deferred prosecution agreement. The fact of the dismissal can, on this record, be attributed to no other motivation. If the facts listed by the Government were the reasons for the Government's belief that the agreement had been violated, the clear course for the Government was to prosecute, not to seek dismissal, particularly because the Government knew of the Texas charges at least one year prior to the dismissal of the assault charge. See Records of the Magistrate, Appellant's Supplemental Appendix B.

to commence prosecution within that period.⁵ Any other interpretation would result in an open-ended waiver of a defendant's rights, a result clearly not envisioned by the language of the agreement.

Moreover, requiring the Government to prosecute within the period specified and only if a violation occurred is logical, for although a defendant may waive his right to a speedy trial, he, in turn, is still assured by the agreement that, upon a violation, his case would be brought to a speedy disposition.

⁵ If this Court finds an ambiguity in the meaning of the operative terms of the agreement, appellant's interpretation still must prevail because any ambiguity should be strictly construed against the Government, which drafted the agreement. C.J.S., CONTRACTS, §324; Alcoa S.S. Co. v. United States, 338 U.S. 421, 429 (1941); Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 190 F.2d 817, 823 (3d Cir. 1951); 3 WILLISTON ON CONTRACTS, §621 (1961); see also Bender v. Hearst Corp., 263 F.2d 367 (2d Cir. 1959).

CONCLUSION

For the foregoing reasons and the reasons argued in the main brief for appellant, the judgment of the District Court must be reversed and the case remanded with instructions to dismiss the indictment.

Respectfully submitted,

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JONATHAN J. SILBERMANN,
Of Counsel.

March 5, 1976

CERTIFICATE OF SERVICE

March 5, 1976

reply supplemental

I certify that a copy of this ^{reply}brief and ^{supplemental}appendix has been mailed to the United States Attorney for the Southern District of New York.

Jonathan Hilberman